IN THE

Supreme Court of the United States

October Term, 1943.

(Consolidated Causes; California Supreme Court, L. A. No. 18066)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners.

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent,

(Superior Court No. 3783)

CITY OF LOS ANGELES, a municipal corporation, DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES,

Petitioners.

vs.

NATURAL SODA PRODUCTS COMPANY, a corporation,

Respondent,

(Superior Court No. 3817)

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

The summary statement of the facts in these causes as set forth in the foregoing petition for writs of certiorari suffices for the presentation of the *jurisdictional* matters

upon which said petition is grounded, and accordingly reference is made to that statement.

Certain *non*-jurisdictional points of general law will require brief mention of certain additional facts bearing thereon.

Jurisdiction.

The jurisdiction of this Honorable Court is invoked under the *due process* clause of the Fourteenth Amendment to the Constitution of the United States, upon the ground that the *effect* of said decision and judgment of the State court whereof review is sought is to take from petitioners without due process of law property owned and operated by petitioners in their *proprietary capacity* for supplying public utility services of water and electricity within The City of Los Angeles and immediately adjacent territory. Fully recognizing that a city's "tenure of property, derived from the State for specific public purposes," is not accorded unlimited constitutional protection, but is so far subject to State control that the State may require the same to "be applied to other *public* uses of the municipality than those originally designated" [*Commissioners v. Lucas*, 93 U. S. 114], nevertheless as declared in the case cited, "property, derived by [municipalities] from *other sources* [than the State], is often held, by the terms of its grant, for special uses, from which it *cannot* be diverted by the legislature. In such cases, the property is protected by *all* the guards against legislative interference possessed by individuals and private corporations for their property." [*Idem.*, p. 115.]

"In general it may be conceded that [a municipal corporation] can own *private* property, not of a public or governmental nature, and that such property may be

entitled, as is said, "to *constitutional protection.*" [*Worcester v. Worcester Street Railway Co.*, 196 U. S. 539, at 551.]

See also,

Montpelier v. East Montpelier, 29 Vt. 12, at 19;

Mount Hope Cemetery v. City of Boston, 158 Mass. 509, 33 N. E. 695;

State of Montana v. Holmes, 100 Mont. 256, 47 Pac. (2d) 624, at 629;

1 Dillon on Municipal Corporations (5th ed.), Secs. 109-110 (pp. 181-184), Sec. 132 (pp. 236-239).[1]

The cases cited to the point that petitioners' *proprietary* property enjoys "constitutional protection" are no less apposite because they deal with attempted legislative interference with municipal property of that character, while in the causes at bar the interference complained of is judicial.

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[1]The case of *City of Trenton v. State of New Jersey*, 262 U. S. 182, does not infringe upon the doctrine of the cases cited in the text. In the *Trenton Case* the state's power to exact from a municipality a license fee or charge for the diversion of water from a public stream for the use of the city's inhabitants, was upheld upon the ground that the right to take such water could only be acquired, directly or indirectly, by grant *from the state*. Accordingly, the municipality as a mere agency of the state holds property of this character subject to state regulation and the imposition of such charge as the state may see fit to impose in the *state's* own favor.

In the causes at bar, on the other hand, the State of California, through its highest court, in effect requires petitioners to devote funds and property derived,—*not* from the State,—but from the taxpayers and public utility consumers of Los Angeles, to uses *foreign* to the purpose to which such property and funds are devoted, for the *profit* of a *private* corporation operating upon proprietary lands of the state. (See 262 U. S. 191.) In the damages awarded the State has no share, such damages being the penalty exacted from petitioners for having failed to dispose of the natural flow of the Owens River in excess of the demands served by them.

The Extent of the Beneficial Use of Water Actually Made by an Appropriator Is the Measure of His Right Thereto and No Duty Can Devolve on Him to Divert Water to Which He Has No Right.

Petitioners' rights to the water of Owens River, as well as of the other streams in the same watershed, were acquired under Section 1411 of the Civil Code of California which declares:

> "The appropriation must be for some *useful* or *beneficial* purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the *right* ceases."

As said in 1 Weil on Water Rights in the Western States (3rd ed. 1911), Sec. 478:

> "Actual use [by the appropriator] has become the sole measure of right."

In *Smith v. Hawkins*, 120 Cal. 86, at 88, the appropriator's right is declared to be *limited* "to such quantity, not exceeding the capacity of the ditch, as the appropriator may *put* to a *useful* purpose"; or as phrased in *Leavitt v. Lassen Irrigation Co.*, 157 Cal. 82, at 86, to "the amount which [the appropriator] had been *actually* taking and *applying* to a *beneficial* use."

See, also,

Senior v. Anderson, 115 Cal. 496, at 503-504;
Hufford v. Dye, 162 Cal. 147, at 153 and 159.

An appropriator is a mere *licensee* of the state whose right to water is limited to the quantity applied to beneficial use whether made, as formerly, under the pertinent provisions of the Civil Code or, as at present, under the Water Commission Act of California. [*Tulare Water Co. v. State Water Commission*, 187 Cal. 533, at 536.] Section 20 of that act is merely declaratory of the rule enunciated *without dissent* in the prior decisions of the Supreme Court of California, namely:

> "All permits and licenses for the appropriation of water * * * shall be effective for such time as the water actually appropriated [thereunder] shall *actually* be used for the *useful* and beneficial purpose for which such water was appropriated, but no longer; [and upon the cessation of such beneficial use the Water Commission] may revoke said permit or license and declare the water to be *un*appropriated and open to further appropriation * * *."

"Actual diversion (the taking of possession) creates the right; actual *use* (the amount in possession) *measures* the right." [*Simons v. Inyo Cerro Gordo Co.*, 48 Cal. App. 524, at 537-538.]

See *California Pastoral, etc., Co. v. Madera Canal and Irrigation Co.*, 167 Cal. 78, citing many of the authorities and declaring that "in so far as the diversion exceeds such reasonably necessary amount [for the purpose for which the water is in fact appropriated], it is *contrary* to the *policy* of our law and unauthorized, is 'a taking *without right*' (*Thayer v. California Development Co.*, 164 Cal. 117 [128 Pac. 21], and can confer no right no matter for how long continued."

Petitioners, as Appropriators of Water, Owe No Duty to Respondent, a Downstream Proprietor, to Prevent the Natural Flow of Owens River, in Excess of Their Needs, Flowing Down the Natural River Channel and Emptying Into Owens Lake, Its Natural Outlet, Either (1) By Operating Their Diversion and Storage Works to Capacity, or (2) By Wasting Water, or (3) By Conserving Water Through Irrigation or Spreading, or (4) By Using Their Regulating Reservoir for Storage.

Since any *surplus* water in the Owens River watershed in excess of that necessary to supply petitioners' current *needs* (including reasonable carry-over storage), is subject to appropriation, as of right, by others, petitioners cannot possibly be under an *obligation* to take and dispose thereof by wasting the same *artificially,—i. e.*, otherwise than by its discharge into Owens Lake as nature has decreed by making Owens Lake the outlet of Owens River. Petitioners have neither obligation nor option to take water for which they have *no use*. The limitation on the appropriator's right theretofore imposed *without exception* by the decisions of the highest court of California, was carried into the State Constitution in 1928 by the amendment adopting Section 3 of Article XIV, which declares that the amount of water that an appropriator may at any time take is limited to such as is "reasonably required for the *beneficial use* to be served," and that such right does "*not* extend to the waste or unreasonable use * * * of water." The right to any excess, in Pothier's phrase, "belongs to the 'negative community'" [1 Weil on Water (3rd ed.), Sec. 7]. How, then, can the diversion and disposal of this *excess* water,

to which petitioners have *no* right, be lawfully held to constitute a burden that they must bear in the interest and for the *profit* of a downstream proprietor such as respondent? To say that at the same time one has *no right* to take water and yet is *obligated* to take it, is to pose a legal impossibility.

The decision of the State Court nevertheless imposes upon petitioners an obligation (1) to take water in excess of their *needs* because, in anticipation of the City's growth and the consequent increase in the demands served by them, they provided *excess* aqueduct capacity to meet that increase over a long future period (fifty years), and also (2) to bear the added *operational expense* of handling and storing this excess water, and further (3) to make the necessary *capital outlay* in acquiring *flowage* rights in the Santa Clara River and on the Mojave Desert to dispose of such excess by wasting it, and finally (4) to suspend the designed function of Tinnemaha Reservoir, namely, the *regulation* of the flow of Owens River during high water,—*i. e.*, at the *only* times when such regulation is imperatively necessary. Such four-fold obligation,—in nowise analogous to flood control for public benefit,—is to enable a private corporation to avail of and process brines from Owens Lake *more profitably* than would be possible if the natural flow of Owens River into that lake were *not* artificially prevented. Petitioners have done nothing to hinder or curtail the operations of respondent or to detract from such advantages as *nature* has afforded on Owens Lake. Quite the contrary. The marked *natural depletion* of the river's flow during the drought in conjunction with the Aqueduct diversions (though then far *less* than in 1937), resulted in a *subsidence* of the *water level* of the lake

by some 20 feet. In 1937, that level rose approximately 2½ feet, notwithstanding petitioner's *greater* diversions in that year and in the months from February to June, inclusive, of that year, than in any *prior* corresponding period,—a circumstance due entirely to the increase in the *river flow* as compared with that during the period of *drought* (1919-1936) when the lake became relatively dry.

Petitioners' diversions in 1937 were 6,000 acre feet *greater* than those in the maximum prior year, and in the months from February to June, inclusive, 1937, were 10,000 acre feet *greater* than in the maximum prior corresponding period. Such diversions throughout the history of the Aqueduct have been both from Owens River and (in much less volume), from the lateral streams below Intake. In 1937, petitioners diverted a total of 271,000 acre feet (260,000 from Owens River and 11,000 from said lateral streams), while in the months from February to June, inclusive, of that year, such diversions aggregated 128,000 acre feet (126,000 from Owens River and 2,000 from the lateral streams). The only prior year in which petitioners' diversions were in volume at all approaching these figures was 1922, when the total diversions for the year were 250,000 acre feet,[2]—*i. e.*, 21,000 less than in 1937,—the

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[2]The figures indicating the aggregate volumes of water diverted represent the inflow into Haiwee Reservoir. The diversions from Owens River are those at Intake and the difference between these respective figures represents the net diversion from lateral streams over and above all losses and discharges from the Aqueduct canal above Haiwee Reservoir. In 1922, 15,000 acre feet more water was diverted at Intake than reached Haiwee Reservoir, not necessarily indicating that there were no diversions from the lateral streams but rendering it probable that, notwithstanding such diversions, there were transmission losses and discharges from the Aqueduct canal in excess thereof.

whole of which was from Owens River, while in the months from February to June, 1922, the diversions were 121,000 acre feet,—*i. e.*, 7,000 less than in 1937,—of which 116,000 were from Owens River (10,000 less than in 1937), and 5,000 from lateral streams.

The two following Tables exhibit in detail the pertinent data.

DATA IN EVIDENCE RELATIVE TO STREAM FLOW IN OWENS VALLEY WATERSHED, PETITIONERS' DIVERSIONS AND DISCHARGE INTO OWENS LAKE

Table I—By Calendar Years in Acre Feet, using even thousands (indicated by M), and omitting the three digits to the right from each item.

Year	a Flow of Owens River at Charlies Butte Pltf. Ex. 1 p. 21-22 M	b Flow of Lateral Streams Below Intake Def. Ex. Z 11 M	c a+b Total Water Available M	d Diversion into Haiwee Pltf. Ex. 1 pp. 43-46 M	e c–d Total Residual Water Not Diverted M	f Diversions from Owens River at Intake Pltf. Ex. 1 pp. 43-46 M	g e–f Residual Water of Owens River Not Diverted M	h Discharge from Owens River to Lake Pltf. Ex. 1 pp. 118-121 M	i e–h Flow of Owens River Withheld from Lake M	j Discharge from Lateral Streams to Lake Def. Ex. 1 p. 138 M	k Flow of Lateral Streams Withheld from Lake M
1906	468	141	609								
1907	405	75	480								
1908	217	50	267								
1909	339	105	444					342	– 3		
1910	253	46	299					234	19		
1911	440	86	526					413	27		
1912	213	47	260					206	7		
1913	174	44	218					121	53		
1914	391	97	488	42	446	117	274	370	21		
1915	271	55	326	36	296	101	170	223	48		
1916	384	94	478	96	382	129	255	308	76		
1917	288	56	344	124	220	151	137	186	102		
1918	260	45	305	200	105	207	53				
1919	198	39	237	194	43	177	21				
1920	171	50	221	205	16	173	– 2				
1921	166	42	208	190	18	167	– 1				
1922	294	59	353	250	103	265	29				
1923	170	39	209	194	15	176	– 6				
1924	119	38	157	144	13	126	– 7				
1925	136	52	188	195	– 7	144	– 8				
1926	165	46	211	181	30	155	10				
1927	244	52	296	265	31	250	– 6	20	224		
1928	169	59	228	215	13	174	– 5	8	161		
1929	141	71	212	194	18	144	– 3	2	139		
1930	225	52	277	251	26	226	– 1	3	222		
1931	220	54	274	247	27	218	2	1	219		
1932	224	53	277	251	26	224	0	2	222		
1933	229	41	270	247	23	238	– 9	2	227		
1934	194	66	260	235	25	199	– 5	2	192		
1935	244	44	288	258	30	245	– 1	6	238		
1936	214	58	272	222	50	211	3	14	200	1	57
1937	293	75	368	271	97	260	33	54	239	7	68

DATA IN EVIDENCE RELATIVE TO STREAM FLOW IN OWENS VALLEY WATERSHED, PETITIONERS' DIVERSIONS AND DISCHARGE INTO OWENS LAKE

Table II—By Periods from February to June, inclusive, in Acre Feet, using even thousands (indicated by M), and omitting the digits to the right from each item.

Year	a Flow of Owens River at Charlies Butte Piff. Ex. 1 p. 21-22 M	b Flow of Lateral Streams Below Intake Def. Ex. Z 11 M	c a+b Total Water Available M	d Diversion into Haiwee Piff. Ex. 1 pp. 43-46 M	e c–d Total Residual Water Not Diverted M	f Diversions from Owens River at Intake Piff. Ex. 1 pp. 43-46 M	g e–f Residual Water of Owens River Not Diverted M	h Discharge from Owens River to Lake Piff. Ex. 1 pp. 118-121 M	i a–h Flow of Owens River Withheld from Lake M
1906	126	58	184						
1907	142	38	180						
1908	78	24	102						
1909	135	61	196					134	1
1910	109	27	136					99	10
1911	174	51	225					165	9
1912	72	25	97					91	–19
1913	70	19	89					45	25
1914	153	59	212	16	196	45	108	158	– 5
1915	113	30	143	22	121	56	57	90	23
1916	177	57	234	32	202	30	147	163	14
1917	129	31	160	32	128	37	92	109	20
1918	122	22	144	78	66	83	39	46	76
1919	100	20	120	88	32	86	14		
1920	72	27	99	92	7	74	– 2		
1921	61	20	81	78	3	63	– 2		
1922	124	34	158	121	37	116	8		
1923	61	17	78	72	6	58	3		
1924	48	15	63	60	3	51	– 3		
1925	44	22	66	67	– 1	46	– 2		
1926	74	12	86	82	4	77	– 3		
1927	102	30	132	115	17	105	– 3	10	92
1928	81	20	101	94	7	83	– 2	6	75
1929	59	28	87	87	0	62	– 3	1	58
1930	101	34	135	123	12	101	0	1	100
1931	96	23	119	109	10	95	1	1	95
1932	92	29	121	110	11	93	– 1	1	91
1933	98	18	116	109	7	108	– 2	1	97
1934	89	21	110	102	8	92	– 3	1	88
1935	100	21	121	103	18	96	4	4	96
1936	102	32	134	108	26	101	1	11	91
1937	151	45	196	128	68	126	25	44	107

It will be noted that out of the total water available in the watershed, petitioners' diversions had the effect of withholding from Owens Lake a *greater* volume of water in 1937 than in any prior year, and of curtailing the lake discharge in a degree incomparably *greater* than had been accomplished by the uses of water in Owens Valley for irrigation, *etc.*, prior to the Aqueduct's operation. Thereby the brines in Owens Lake were rendered more profitably available than they otherwise would have been. The real ground of respondent's complaint is that petitioners did *not* render them *still more so* in 1937, (a) by increasing their diversions, from the record high established that year, up to the *capacity* of the Aqueduct, (b) by disposing of this excess water through means *not* then nor now available to petitioners, (c) by discontinuing the *function* of Tinnemaha Reservoir as a stream regulator pending such disposal, and (d) by spreading water on their lands in Owens Valley to effect *unneeded* underground storage thereof.

A. Diversion by an Appropriator, However Long Continued, Cannot Cause a Watercourse to Lose Its Status as Such.

In *Lindblom v. Round Valley Water Co.*, 178 Cal. 450 it is said:

> "If North Canyon was, under natural conditions, a watercourse, it would not lose that character by a mere diversion, however long continued, although the rights of the riparian owner might be subordinate to those of the appropriator." [178 Cal. 452.]

In the causes at bar, the uncontradicted evidence is that the *original* and *only* channel of Owens River below Intake has at all times continued as such; that water has flowed therethrough into Owens Lake in every year; and that in every year except nine (not all consecutive) of the 18 years' *drought,* this water included (in addition to the make of the stream below Intake), so much of the natural flow of the river that at Intake was *excluded* by petitioners from the Aqueduct because in excess of their then needs therefor. If, however, the fact were otherwise, and no water had flowed down the channel in Owens River below Intake, that part of its channel would *not* have lost its character as a natural channel but its status as such would have continued. This point was directly in issue in the *Lindblom Case, supra,* and the court's ruling therein conforms strictly to the statement just made.

Authorities Denying the Existence of Any Obligation on the Part of an Appropriator of Water to Divert or Dispose of Any Volume of the Natural Stream Flow in Excess of That Necessary to Supply His Beneficial Uses.

The cases cited *infra* present a single circumstance in common, namely, the loss by one party of an *incidental benefit* by him previously derived from an *artificial* change wrought by another affecting or causing a flow of water. The only difference between them and the causes at bar,—a difference wholly favorable to petitioners,—is that here respondent did *not* lose the incidental benefit by it derived from petitioners' abstractions of water from Owens River. On the contrary, respondent received such incidental benefit in *fuller measure* in 1937, and in the months from February to June, inclusive, of that year, than in any prior corresponding period.

Classification of the Cases Relied on by Petitioners.

The cases most closely in point fall into one or other of the following three main classifications:

Class A. Case in which a person entitled to water, or the use of water, had *not* taken or used the same, thereby withholding the incidental benefit that would otherwise have been derived by downstream proprietors.

Coulson v. Aberdeen-Springfield Canal Co., 39 Ida. 320; 227 Pac. 29.

Class B. Cases in which the use served by the artificial condition had been totally *abandoned*.[3]

Drainage District No. 2 v. Everett, 171 Wash. 471, 18 Pac. (2d) 53;

Lake Drummond Canal and Water Co. v. Burnham, 147 N. C. 41; 60 S. E. 650; 17 L. R. A. (N. S.) 945.

Class C. Cases in which the artificial change made in the stream was of such a *limited, special* or *temporary* character as to alter or create *only correspondingly* rights in respect of the original channel and/or of the artificial one.

Arkwright v. Gell, 5 Mees. & W. 203;

Burrows v. Lang [1901], 2 Ch. Div. 508;

McEvoy v. Great Northern Ry. Co. [1900], 2 Ir. Rep. 325;

Mason v. Shrewsbury Ry. Co., L. R. 6 Q. B. 578;

Baily v. Clark, Son & Morcland [1902], 1 Ch. Div. 649;

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[3]There is, of course, no comparable abandonment in the causes at bar; but cases of abandonment are illustrative of the principle that such rights as may be acquired by downstream proprietors on the original channel, by reason of an artificial change serving a *limited, special or temporary purpose*, not only are subject to conditions and limitations in *correspondence* with the limited and special use while the same persists, but are also subject to defeasance by restoration of the natural condition when the use served by the artificial change is wholly abandoned. (See *Goodrich v. McMillan*, 217 Mich. 630; 187 N. W. 368.) The observations in this note do not, of course, apply to any case in which there has been an unlimited *dedication* of a new channel as a *substitute*, in whole or in part, for the natural channel, and in those cases, the natural condition, once the dedication is complete, cannot be restored to the injury of proprietors on either the original or the substituted channel.

Rameshur Pershad Narain Singh v. Koonj Behari Pattuk, L. R. 4 App. Cas. 121;

Wood v. Waud, 3 Ex. 748; 154 Eng. Rep. Reprint 1047;

Greatrex v. Hayward, 8 Ex. 291; 155 Eng. Rep. Reprint 1357;

Oliver v. Lockie, 26 Ont. Rep. 28;

Peter v. Caswell, 38 Oh. St. 518 (a flood gate or weir discharging into the old channel);

DeWitt v. Bissell, 77 Conn. 531 (a mill pond, use of which necessarily entailed a lowering of the water level during dry seasons);

Mitchell Drainage District v. Farmers Irrigation Dist., 127 Neb. 484; 256 N. W. 15 (a spillway and needle gate discharging into the old channel);

Whitcher v. State, 87 N. H. 405; 181 Atl. 549 (a gate in a dam discharging into the old channel).

Of the cases in Class A, *supra*, the ruling is:

"The right to the *beneficial use* [of water] is all that can be acquired. * * * It follows, therefore, that *no legal duty* devolves upon any water user to divert any more of the water to which he is entitled, than he can put to a beneficial use [and hence] in permitting the water not needed by him to *remain* in the [stream, he] cannot be held to have contributed to the injury" caused thereby. [227 Pac. 30.]

Of the cases in Class B, *supra*, the ruling is:

"Where the proprietor of an upper tenement constructs and maintains on his *own* premises, and for his *own* convenience and advantage, an artificial

waterway, or any artificial structure, affecting the flow of water, and such structure invades no right of the lower proprietor, and gives indication that it is for a temporary purpose or a *specific purpose* which may at any time be abandoned, the upper proprietor comes under *no obligation* to maintain the structure and the conditions produced by it from lapse of time, though the *incidental* effect has been to confer a benefit on a lower tenant. Nor in such case does the lower proprietor acquire any right which only rests on *prescription.* An easement arising in that way can only be established by reason of adverse possession or continuous invasion of another's right." [18 Pac. (2d) 50.]

Of the cases in Class C, *supra,* the rulings are sufficiently summarized in Gould on Waters, where, after recognizing in Sec. 225 the rule that an artificial watercourse under certain circumstances may acquire the status of a natural channel, the author, in Sec. 340, says:

"An active enjoyment for more than the statutory period is *not* an enjoyment as of *right,* if during the period it was known that it is only permitted so long as some *particular purpose* is served."

The case of *Arkwright v. Gell, supra,* is typical. It was there held that the right to maintain an artificial watercouse (a drain from a mine), over the land of another, gave *no* rise to rights by prescription in the latter to the enjoyment of the flow of the water through such drain because, as said in 3 Farnham on Waters and Water Rights, Sec. 827 (d),

"the right to the flow being based on the presumption of a grant, there is nothing to support the pre-

> sumption in such a case, because the mine owner will *not* be presumed to have intended to grant a right which will *interfere* with *his use* of the mining property, . . . And the court, in *Burrows v. Lang*, [*supra*], said that the meaning of a 'temporary purpose' is not confined to a purpose that happens to last in fact for a few years only, but includes a purpose which is temporary in the sense that it may, within the reasonable contemplation of the parties, come to an end. If a man makes a watercourse leading water to a mill pond for the use of his *own* mill on his *own* land, that is a temporary purpose, as it is limited to the period for which he uses the mill. It is *not* meant to be a permanent alteration of the *face of nature*, but a temporary alteration for the *purpose of*, and *co-extensive* with, the carrying on of a *particular business*. * * *."

A comparison of the classification of petitioners' cases above made with the classification, *infra*, of the cases cited by the State Court, will afford a ready means of apprehending the wholly distinct character of the two lines of authority (other than the cases included, respectively, in "Class 3" of those cited by the State Court and in "Class C" of petitioners' case), and will likewise serve to demonstrate the identity in principle of the causes at bar with petitioners' authorities as well as with those of said "Class 3," and the inapplicability herein of the rule on which respondent relies.

Abstract of Certain of the Cases in the Several Classes of Those Relied Upon by Petitioners.

(a) Case in Which a Person Entitled to Water Had Failed to Divert the Same.

The only case in which the ground of complaint was that a person entitled to water for beneficial use did *not* divert the same because of *no need* therefor is *Coulson v. Aberdeen-Springfield Canal Co.*, 39 Idaho 320; 227 Pac. 29, a case fully sustaining petitioners. There the owner of land in an irrigation project sued the canal company for the loss of a bull killed by falling into a gulch washed out by the discharge, through defendant's waste ditch on plaintiff's land, of *unused* water from defendant's canal. Defendant pleaded, as contributory negligence, that plaintiff had failed to *avail* himself of the *full quantity* of water to which he was entitled for irrigating his land, with the result that the water not taken by him flowed through the waste ditch and washed out said gulch. In disallowing such plea of contributory negligence, the court said:

> "It is against the *public policy* of the state, as well as against express enactments, for a water user to take from an irrigation canal *more* water, of that to which he is entitled, than is *necessary* for the irrigation of his land and for domestic purposes. The waters of this state belong to the state, and the right to the *beneficial use* thereof is all that can be acquired. * * * It follows, therefore, that *no legal duty* devolves upon any water user to divert any *more* of the water, to which he is entitled, than he can put to a *beneficial use*. * * * In permitting the water not needed by him to *remain* in the

> canal and pass into the waste ditch, appellant [plaintiff] cannot be held to have contributed to the injury." [227 Pac. 30.]

The public policy of Idaho as declared in the *Coulson Case, supra*, is likewise that of California. In *California Pastoral, etc., Co. v. Madera C. & I. Co.*, 167 Cal. 78, this policy is held "to require the highest and greatest possible *duty* from the waters of the State [for] beneficial purposes," the court emphasizing that "any actual use in *excess* of reasonable requirement is *waste*." [167 Cal. 84.]

(b) Cases in Which the Use Served by an Artificial Alteration in Respect of a Stream Had Been Totally Abandoned.

The Supreme Court of California (adopting respondent's contention), holds, in effect, that the Los Angeles Aqueduct is a *permanent* waterway and that its use can neither be abandoned, nor *limited* to the diversion of any volume of the natural flow of Owens River *less* than its capacity. Such holding is directly contrary to the controlling principle of the doctrine of appropriation,—namely, that when the *use* ceases, the *right* ceases. [Cal. Civ. Code, Sec. 1411.] The right to divert under an appropriation is a *privilege* accorded by the State, and *not* an obligation. That privilege may be forfeited for nonuse—regardless of the intention of the appropriator. In view of these long recognized principles of appropriation, few cases have arisen where the appropriator's right to abandon his appropriation has been questioned, but in each such case, the right of the appropriator to cease his appropriation (diversion or storage) has been upheld.

In 27 R. C. L., p. 1205, Sec. 123, their holdings are thus summarized:

> "* * * riparian owners on a stream *cannot compel* one who has long diverted water therefrom for use in a canal to continue the diversion, although by reason thereof the natural channel has become too small to contain the full volume of the stream. * * *."

In *Drainage District No. 2 v. City of Everett*, 171 Wash. 471, 18 Pac. (2d) 53, a dam impounding the waters of a creek under a *perpetual* right to divert the same for the use of the city, was destroyed upon the abandonment of this source of the municipal supply, thereby restoring the flow of the creek to the old channel. Such water as had escaped over the dam's spillway had always followed the natural channel; but in a portion of a slough connected therewith, there ceased to be any water and, accordingly, the owners thereon filled it in and used it for agricultural purposes. This dry condition of the slough had continued for some twenty-six years. During the earlier portion of this period, the Drainage District installed a drainage system and, in so doing, deemed it unnecessary, by reason of the city's diversion from the creek, to take into consideration the former flow through the slough. Before destroying the dam, the city let the impounded water escape gradually and flow down the natural channel of the creek and thence into the drainage ditches of the District, wherein it deposited silt. The District recovered damages from the city but was denied an injunction, whereupon both parties appealed. The District contended that the *artificial* condition (the diversion and impounding), which had existed for thirty years, constituted a *permanent* change upon the continuance of

which the District had relied in improving its property, and, accordingly, that it was entitled to have such condition maintained. In reversing the judgment for damages and affirming the denial of the injunction, the court said:

> "So long as appellant [defendant City] maintained the dam in such a manner as not to injuriously interfere with the legal rights of others below and above the reservoir, no right of action could be maintained against the appellant. Does it not follow that the appellant could at any time legally abandon that dam and permit the waters, which otherwise would be impounded, to flow as those waters were wont to flow in the *natural* channel on the property of the respondent [plaintiff District], which property was the servient estate? * * *
>
> "The acquisition of the right to divert the waters and to maintain a reservoir for impounding those waters, though that artificial condition was maintained by appellant [defendant] for the prescriptive period, carried with it *no reciprocal right* to have its maintenance continued for the benefit of the servient estate [plaintiff's property]." [18 Pac. (2d) 55.]

See also *Lake Drummond Canal & Water Co. v. Burnham*, 147 N. C. 41; 60 S. E. 650; 17 L. R. A. (N. S.) 945 (1908), holding that the operator of a canal for public travel could *not* be compelled by defendants to maintain a cross canal serving as a feeder of water into the main canal by reason of "an *incidental benefit* through drainage by the cross canal" of defendants' lands. [*Mitchell Drainage District v. Farmers Irrigation District, supra*, citing the *Lake Drummond Case* at 256 N. W. 20.]

(c) Cases in Which the Artificial Alteration in Respect of a Stream Was Made for a Special and Limited Purpose.

Any change in respect of the flow of a stream made to serve a *special* and *limited* purpose is only a change *pro tanto* in correspondence with the *fulfillment* of that purpose. A structure such as the Los Angeles Aqueduct constitutes a striking instance in which its limited and special character is *advertised*, for all who run to read, by the purpose it is designed to serve and its use,—to say nothing of its appurtenances (particularly the gates at Intake for excluding therefrom, or admitting thereinto, the water of Owens River at will).

The causes at bar present a situation,—*not* of restoration of a natural condition by abandonment or modification of the purpose served by the artificial condition,—but one in which the artificial change is, has been, and will continue to be, of *limited* scope and *measured* by the *beneficial uses* petitioners have undertaken to serve; while respondent's grievance is that the artificial change has not been *greater*, to wit, one measured by the total continuous *capacity* of the Aqueduct (necessary outages excepted), irrespective of the uses served by petitioners.

In *McEvoy v. Great Northern Ry Co., supra*, "Palles, Ch. B., says it is settled law that the rights to the water flowing in an artificial watercourse constructed by a particular person upon his own land and for his own benefit are not regulated by the law applicable to natural watercourses; but are to be ascertained by a view of the *purposes* for which the original structure was built." [3 Farnham on Waters and Water Rights, sec. 827d, p. 2437, note 15.]

In 1 Wiel on Water Rights (3rd ed.), it is said:

> "Sec. 60: * * * Where the owner of the land has artificially changed the course of the stream so as to affect other riparian proprietors favorably, and acquiesced therein for a sufficient length of time, he cannot claim the right to change the flow of the water to the detriment of such other riparian owners; for such acquiescence on his part is binding like a public dedication. * * *
>
> "This rule rests upon a *quasi dedication* of the artificial condition to the *public*, and the essence of it is the growth of a *community* dependent upon the artificial condition. Where *no* such community-interest has been created, and the question is solely between a single individual and the original creator of the artificial watercourse or condition, the rules purely of *prescription*, * * * apply. The rule of dedication to the public just set forth is *in*applicable."

One of the most recent and, because of its review of the authorities, one of the most valuable of the cases upon the point here in issue is *Mitchell Drainage District v. Farmers' Irrigation District, supra.* Plaintiff drainage district there sought an injunction to prevent defendant irrigation district from permitting waters from a certain draw to pass through the latter's irrigation canal and thence into the drainage district. For many years, defendant had intercepted these waters for use for irrigation. The draw had formerly been a dry slough for most of each year, but after the irrigation ditch was constructed water therefrom gathered in the draw. Defendant's diversion of the waters of the draw did not prevent seepage water from coming down into Mitchell and therefore plaintiff constructed its drainage ditch, but without taking into

account the waters in the draw through its reliance upon defendant's continuing to intercept them. A spillway was put in the irrigation canal when it was built, directly opposite the draw; and after the completion of the drainage ditch a *needle gate* also was put in the irrigation canal opposite the point where the draw came into the same. Thereby the waters in the canal could be let through into the drainage district. The needle gate was *used* but a few times after its installation in 1914, and again some twelve years later, after which, due to plaintiff's protests, it was closed.

In the suit, commenced because of the opening of the needle gate in 1932, plaintiff based its claim to injunctive relief on the grounds, (1) that defendant is estopped to discharge the water, so long intercepted, into the drainage district; (2) that defendant had obtained a prescriptive right to the water and plaintiff had obtained a reciprocal right to have its flow continued as it had been during the prescriptive period; and (3) that the new watercourse had become the *natural* course of the stream and the right to its continuance had become absolute. In denying the injunction, the court, after reviewing the authorities, says:

> "There is, it must be conceded, a clearly distinguishable difference between the prescriptive right obtained for a *temporary* or *specific* purpose and one that from the beginning was, or later became, of a permanent character. Dams for mills illustrate the first. A diversion of water out of the old bed of a stream in order to make it more fit for agriculture illustrates the second. The effect may be the same in both, but the *purpose* is different. The first is for the benefit of the builder of the dam. Advantages accruing to upper or lower owners are *incidental only.*

The second may be for the very purpose of *benefiting* the owners of the land and they begin at once to make their improvements in reliance on the change thus made being permanent.

"A dam is generally held to be a structure for a specific and temporary purpose, although of course it may continue for many years. The placing of the *needlegate* in the south bank of defendant's irrigation district was a continuous *notice and threat* to the plaintiff that the waters from Wet Spottedtail Draw might be let through. * * *

"Unquestionably the owner of a dominant estate does *not* generally owe the servient estate any duty except not to injure him by irrational conduct or wantonly or capriciously. *Taft v. Bridgeton Worsted Co.*, 237 Mass. 385, 130 N. E. 48, 13 A. L. R. 928. * * * The estate is for the benefit of the one that is dominant, and the servient estate remains servient. While there are many cases where rights accrue to the servient estate on account of acquiescence or estoppel, the mere *intercepting* of the waters by defendant irrigation district would *not* and could *not* give the plaintiff drainage district *any rights*. The use of it was for the benefit of *defendant* irrigation company. Through use of such waters for ten years or more the irrigation company might obtain the right to continue to use them. This would give *no* corresponding or *reciprocal* rights to the drainage district to require the irrigation district to continue to use or care for the waters unless the defendant became estopped, and the only estoppel suggested in this case is the alleged fact that the drainage district was established and its money expended to defendant's knowledge under the belief induced by defendant that the drainage district would never be asked

or required to take care of these waters. Plaintiff to acquire any rights would have to show that it improved its property with reference to the diversion and in *reliance* on a continuance thereof, which it had *no right to do* in view of the *needle-dam* and spillway. * * * Our conclusion is that the weight of recent authority supports the proposition that *no* reciprocal right accrued to plaintiff because defendant intercepted and used these Wet Spottedtail waters; that even if such right exists plaintiff has not fully brought itself within the principle of the authorities it relies on, since *all idea of permanency is destroyed by the spillway* which was put in when the dam was constructed *and by the needle-gate* which was put in in the fall or early winter after the completion of plaintiff's original drainage ditch; that if plaintiff could acquire any rights to demand of defendant that it continue to intercept and use those waters, such right would have to be based on principles of acquiescence, dedication or estoppel, and that the facts here do not justify a finding in plaintiff's favor on such grounds. * * *." [256 N. W. 21-22.]

In *Felton v. Simpson,* 11 Ired. 84 (to quote Gould on Waters, sec. 340),

"* * * the Supreme Court of North Carolina held that the owner of land protected by a dam which ponded the water in heavy falls of rain until it was drained off by ditches leading from the pond through the plaintiff's land, could *not* gain a *prescriptive* right to the benefit of this protection, inasmuch as there was nothing which could be granted, and *no adverse possession* of anything which, without a grant, would expose the party to an action. The submission to the exercise of an easement by the

owner of the dominant estate, for *his own* purposes and in *his own* way, does *not* necessarily give the servient owner a right to the continuance of the easement imposed, because it is attended with incidental advantages to the latter; but the former may, if he chooses, cease to exercise it entirely. An active enjoyment for more than the statutory period is *not* an enjoyment as of *right*, if during the period it was known that it is only permitted so long as some *particular purpose* is served."

In the cases at bar, petitioners have altered the natural water level of Owens Lake precisely to the extent that their draught upon Owens River for supplying The City of Los Angeles has affected such level, and no more or otherwise,—a circumstance rendering particularly pertinent the cases of Class C, *supra.*

The Distinction Between a Conduit Serving a Specific and Limited Purpose and an Artificial Channel Serving All of the Purposes of a Natural Channel in Substitution Therefor.

In *Chowchilla Farms, Inc. v. Martin,* 219 Cal. 1, the reason for the court's conclusion that the (originally) artificial channel there under consideration had become the naturel channel is stated to be "the permanent nature of the new channel, the long uninterrupted *use* thereof as a *natural* channel and the complete and consistent acquiescence in such use by *all* those through whose *lands* said channel *runs* or who were *instrumental* in its *construction.*" [219 Cal. 25.] In that case, an artificial channel through a swamp, by means of which water from King's River flowed into San Joaquin River, had existed and

been used uninterruptedly for a long time "as the *natural* [drainage] channel." The controversy was between two claimants to the water and the uses that had been made of the *artificial* channel in all respects *conformed* to the uses that a *natural* stream channel regularly serves. In other words (to adopt the language by the court quoted from *Falcon v. Boyer*, 157 Iowa, 745; 142 N. W. 427, at 429, "it had become a *living*, flowing *stream* of water, with all the essential *elements* of a watercourse." [219 Cal. 16.]

The Los Angeles Aqueduct, however, entirely lacks these elements. While it is of a "permanent nature" in one sense of the term,—*i. e.*, that of structural permanency,—such structure has not, nor has the flow of water in it, that quality of permanency attaching to a *natural channel* or to a *natural flow* of water. Both the Aqueduct and the flow of water therein are dependent for their continuance and regulation upon *human will and activity*, while both a natural channel and the natural flow of its stream are dependent in respect of both continuity and regulation solely upon the *forces of nature* operating uninterruptedly. The use of the Aqueduct on the other hand and the flow of water therethrough is regulated and/or discontinued at the will of petitioners as actuated by the exigencies of the *river flow*, the *demands* served, necessary *maintenance, etc.*

Again, the Aqueduct has never been *used* "as a natural channel," but as a mere *transportation device* for conveying water from the watershed of its origin to its place of use in a distant one. If it were used as a natural channel, the water therein would partake of the nature of the *realty*. Obviously, from the moment the water enters the Aqueduct and is thereby severed from the River (so to

speak), it becomes *personal* property, to which neither riparian nor appropriative rights can attach, and anyone abstracting it therefrom would be guilty of a larceny irrespective of his ownership of land bordering on the Aqueduct. Furthermore, if the Aqueduct were *used* as a natural channel, the *public* would have access thereto for fishing, boating and bathing. *No* such public right can possibly attach to the Aqueduct itself or to the water therein, and an entry thereon otherwise than by permission of the owner would be a trespass.

Finally, the acquiescence in the use of an artificial channel that may give it the *status* of a natural channel, must be "by all those (a) through whose lands said channel runs", or (b) "who were *instrumental* in its *construction.*" [*Chowchilla Case, supra.*] Respondent, in the causes at bar, holds no land through which the Aqueduct runs, and the only entities instrumental in its construction were the City and its subordinate agencies, the predecessors of the present Department of Water and Power. Apart from this, however, there being *no use* of such an aqueduct as a natural channel, such acquiescence is an *impossibility.*

Although presently disregarded by the State court, its own comprehensive treatment of this subject in the *Chowchilla Case, supra,* renders unnecessary further reference to the authorities demonstrating the erroneous character of the judgment whereof review is sought. However, we notice briefly the cases presently cited by that court [143 Pac. (2d) 15-16], in order to demonstrate that *not* a single *one* of them is in point or supports the State Court's view, and that one of them (*Kray v. Muggli, infra*) has met with practically universal condemnation by jurists and text writers. There is only one case in the books

(*Coulson v. Aberdeen-Springfield Canal Co., supra*), wherein the ground of complaint was that a person entitled to water for a given beneficial use did not *divert* water for which he had *no use*,—a case directly and unequivocally *contra*.

Classification of Cases Cited in the Opinion of the State Court.

Certain of the cases now to be classified have features permitting of their inclusion in more than one category, and this will be done with the addition in each instance of an appropriate cross reference.

Class 1. Cases in which the artificial condition of the stream had been created at a time when the land affected thereby and involved in the controversy was in a *common ownership* which was thereafter *severed* by conveyance made while such artificial condition persisted.

Pere Marquette Ry. Co. v. Siegle, 260 Mich. 89; 244 N. W. 239 [see also under Class 6, *infra*];

Shepardson v. Perkins, 58 N. H. 354 [see also under Class 4, *infra*];

Marshall Ice Co. v. La Plant, 136 Ia. 621; 111 N. W. 1016 [see also under Class 6, *infra*];

Greisinger v. Klinhardt, 321 Mo. 186; 9 S. W. (2d) 978.

None of these cases of Class 1 is at all in point, the causes at bar *not* presenting the controlling circumstance of a common ownership subsequently severed during the existence of the artificial condition produced by petitioners' diversions from Owens River.

Class 2. Cases in which a previously existing condition of the stream, whether natural or artificial, had been altered by *joint or reciprocal action* of riparian proprietors, including the respective parties to the litigation and/or their predecessors.

Matthewson v. Hoffman, 77 Mich. 420; 43 N. W. 879 [see also under Class 5, *infra*].

Obviously, in the causes at bar there was *no* such joint or reciprocal action as that which was determinative in the case cited last above in Class 2.

Class 3. Cases in which the artificial change made in the stream was of such a *limited, special,* or *temporary* character as to alter only *correspondingly* rights in respect of the original channel and/or of the artificial one.

Hammond v. Antwerp Light & Power Co., 230 N. Y. Supp. 621;

Smith v. Youmans, 96 Wis. 103; 70 N. W. 1115;

Peter v. Caswell, 38 Ohio St. 518.

[N. B. This category is the same as Class C, *supra*, of the cases relied upon by petitioners, and is inclusive of those, wherein the limited, special, or temporary character of the artificial change had been specially *advertised* by the nature of the artificial structure or its appurtenances.]

These cases of Class 3, so far as in point, support petitioners' contention that, as the artificial condition produced by them was merely the *abstraction* from Owens River of certain *absolute* volumes of water, and as they were *greater* in 1937 than ever theretofore, no duty could

on any theory devolve on petitioners to make *still larger* diversions.

Class 4. Cases in which landowners on the new channel, or on any stream or lake into which it discharged, had *acquired* by use or sufferance the right to *avail* of the water flowing in, or discharging from, such new channel.

Chowchilla Farms, Inv. v. Martin, 219 Cal. 1;

Shepardson v. Perkins, 58 N. H. 354 [see also under Class 1, *supra*].

These cases of Class 4 are in nowise analogous to the causes at bar. The artificial channels there in question were designed to perform *all* of the functions of natural channels, and the land owners thereon had acquired *rights,* by use or sufferance, in so much of the water as flowed therein; but where the same was only a *part* of the flow of the stream, the rights so acquired did *not* affect the status of the natural channel, as such, in respect of the water that *continued* to flow in it. On the other hand, the Los Angeles Aqueduct serves only the *single* purpose of transporting water in volumes determined by the current *demands* therefor in The City of Los Angeles, and no rights have attached thereto in favor of any land owner as such.

Class 5. Cases in which the owners of land on the wholly or partially *abandoned* natural channel had acquired an easement in the *artificial* channel for the dis-

charge or drainage of water which had originally flowed over or through their land.

Mathewson v. Hoffman, 77 Mich. 420; 43 N. W. 879 [see also under Class 2, *supra*];
Matheson v. Ward, 24 Wash. 407;
Delaney v. Boston, 2 Harr. (Del.) 489;
Ford v. Whitlock, 27 Vt. 265.

The causes at bar present no feature in common with these cases of Class 5, the natural channel of Owens River below Intake *not* having been abandoned, in whole or in part, but having always existed as such and having, throughout the Aqueduct's history, served to convey the river flow *in excess* of petitioners' diversions, as well as the *make* of the stream below Intake, to the river's natural point of discharge into Owens Lake.

Class 6. Cases in which the respective parties have *by contract* agreed to maintain an artificial condition in respect of a stream or body of water.

Pere Marquette Ry. Co. v. Siegle, 260 Mich. 89; 244 N. W. 239 [see also under Class 1, *supra*];
Marshall Ice Co. v. La Plant, 136 Ia. 621; 111 N. W. 1016 [see also under Class 1, *supra*].

These cases of Class 6 have nothing in common with the causes at bar, there being here no contractual relationship between the parties.

Class 7. Case in which the party creating the artificial condition in respect of the stream had thereby *adversely* invaded the land of another and, by *adversely* maintaining such condition for the *prescriptive* period, had acquired a permanent easement so to do.

Kray v. Muggli, 84 Minn. 90; 86 N. W. 882.

This case of Class 7 is not at all in point. In the causes at bar, petitioners by their diversions did *not* invade the properties of respondent at all, nor divert water *adversely* to respondent. As they acquired *no* right from respondent by prescription, there is lacking any possibility of a *reciprocal* right arising in respondent. (That this distinguishment of the *Kray Case* is sound, see *Schulenberg v. Zimmerman*, 86 Minn. 70, 90 N. W. 156, at 157, decided by the same court.)

Moreover, *Kray v. Muggli, supra*, is opposed to the weight of authority in treating as permanent a mill-dam,—*i. e.*, a structure otherwise universally regarded as *temporary* in the sense that its maintenance is contemplated only so long as it serves the specific and limited purpose for which it was erected.[4]

There has been no case cited (and we have been able to find none), wherein a conduit constructed and operated to effect and avail of a statutory *appropriation* of water has been held to be a *natural watercourse*. We have developed, *supra*, the point that an appropriator of water is a mere *licensee* of the State. The amount of water which he may divert is *not* fixed by any obligation to, or under-

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[4]In disapproval of this case, note the following comments:

"There seems to be no principle upon which *Kray v. Muggli* can be supported. [3 Farnham on Waters and Water Rights, p. 2406.]

"The doctrine [of reciprocal rights] must depend for its existence upon [*Kray v. Muggli* and *Middleton v. Gregorie*, 2 Rich. (31 S.C.L.) 631]; and since the doctrine as applied in them is that the acquisition of a prescriptive easement imposes an equal burden to maintain the easement, without any claim of adverse right on the part of the owner of the servient estate, which has *no* place in law of *prescriptive* titles, the broad doctrine of *reciprocal* rights * * * must be held to have *no existence*." [*Id.*, pp. 2438-2439.]

standing with, a lower riparian, but is definitely *limited* to such volume thereof as has been applied to beneficial use. The appropriator may not only abandon his right of diversion at any time, but he will be held to have forfeited his right (in whole or in part) if he fails for the statutory period to apply the water to a beneficial use. Of course, the appropriator may,—nay, indeed, *must*,—abandon (in the sense of allowing to *remain* in the stream) that portion of the flow thereof for which he has *no* beneficial use.

The State court attempts to distinguish *Drainage District No. 2 v. City of Everett*, 171 Wash. 471; 18 Pac. (2d) 53; 88 A. L. R. 123, by declaring that, in refusing to persons who have made costly adjustments in reliance upon an artificial change in respect of a stream being permanent "as much protection as if the condition were natural," the Washington court so decided "apparently because it would be an excessive burden for one to maintain a dam that is of *no further use* to him." There is *no* such intimation in that opinion.[5] The case explicitly holds that "an artificial waterway, or any artificial structure, affecting the flow of water [that] invades *no* right of the lower proprietor and gives indication that it is for a *temporary purpose* or a *specific purpose*, [gives rise to] *no obligation to maintain* the structure and *conditions* produced by it, from lapse of time, though the *incidental* effect has been to confer a *benefit* on the lower

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[5]This supposed ground of decision, if adopted in the case of *Kray v. Muggli*, *supra*, would have produced a result directly contrary to the actual decision therein.

tenant, [because] there is *no foundation* for a doctrine of *reciprocal* easements founded upon the *prescriptive right* of *only one* of the parties in interest." [18 Pac. (2d) 56-57.]

The State court is even more unhappy in its references to the cases of *San Gabriel Valley Country Club v. Los Angeles*, 182 Cal. 392; 188 Pac. 554, and *Mitchell Drainage District v. Farmers' Irrigation District*, 127 Neb. 484; 256 N. W. 15. The *San Gabriel Case* is cited to the proposition that "the rights of those who improve land previously submerged would be infringed if the land were *submerged again.*" [143 Pac. (2d) 16.] There is no such ruling or dictum therein, the case having involved erosion of land,—*not* submersion at any time,—caused by the increased velocity of the flow in a stream due to artificial improvement of its natural channel. Moreover, such erosion was held *not* to constitute an actionable injury

The *Mitchell Drainage District Case* is cited to the proposition that "when the owner maintains [a] dam but alters the flow to increase his profit at the expense of those below him, or merely to be *arbitrary*, it is reasonable to require that the alteration shall not injure those who have relied on the customary operation of the dam in the past." [143 Pac. (2d) 16.] This case (see *supra*), fully sustains petitioners. The discharge of water there in question was neither for the purpose of "increasing defendant's profit" nor was it "arbitrary", but merely to return to the stream of its origin water which defendant did not desire to retain in its irrigation canal. In a sense, such discharge was not even "customary," for the needle

gate through which it was effected had been operated only a few times shortly after its installation in 1914, again some 12 years later (1926), and then again in 1932 after an interval of 5 additional years. Thus, in the 17 years next preceding the action, it had been operated but once before the occasion resulting in suit. The court, however, held that it was the mere *potentiality* of the use of the needle gate to perform the function it was designed to serve,—and *not* its *actual use*,—that "destroyed all idea of *permanency*" of the canal's interception of the waters previously taken into and retained in the canal, such waters being those of a draw crossed by the canal and the needle gate, when opened, discharging such waters into the same draw below the canal.

The Los Angeles Aqueduct of itself *gave notice* that its specific purpose was to serve the demands for water in The City of Los Angeles, and, accordingly, that its use would be to only such extent of its capacity as should be necessary so to do,—a notice rendered all the more definite and forceful by the constitutional limitation of the appropriative right to beneficial use, and by the unvexed current of prior judicial authority in California declaring "*beneficial use* [to be] the measure of the appropriate right." To this standing notice was added that imported by the gates at Intake for regulating the admission of water into the Aqueduct, and for excluding therefrom any of the river flow in excess of petitioners' needs and thus permitting it to pursue its natural course down the channel of Owens River into Owens Lake.

As Petitioners Owed No Duty to Respondent to Divert Water to the Capacity of Their Facilities, Their Failure So to Do Was Not Negligent; and There Is No Slightest Hint of Wanton or Malicious Conduct by Petitioners.

Any duty of petitioners to divert and store water is one arising out of its obligation to serve its consumers and is, therefore, owing to them alone,—and *not* to a downstream proprietor not of that class, such as respondent. The spreading of water is one mode of effecting storage of a limited portion thereof in aid of petitioners' discharge of their obligation to provide a municipal water service. Petitioners have *no lawful authority* to engage in irrigation for *agricultural purposes*, or, *per se*, in either *conservation* of water or *flood control*. In fact, it is difficult to conceive of any municipality being granted power to perform such functions except as an incident to the rendition of municipal water and/or hydroelectric services, or for flood protection within its own territory.

Even if there had been a *shortage of water* in The City of Los Angeles (which, emphatically, there never has been), and if such hypothetical shortage had been due to some default on the part of petitioners, this circumstance could *not* operate to vest respondent with any such cause of action as is herein asserted; for it is elementary that A's breach of a duty owing to B cannot become the basis of an action in favor of C to whom no such duty is owing.

Stowers v. Dwight Mfg. Co., 202 Ala. 252, at 254; 80 So. 90, at 92;

Bogdon v. Los Angeles, etc. Ry. Co., 59 Utah 505; 205 Pac. 571;

Garland v. Boston etc. Ry. Co., 76 N. H. 556; 86 Atl. 141; 46 L. R. A. (N. S.) 338; Ann. Cas. 1913 E, 924;

62 *Cor. Jur.* 1096;

45 *Cor. Jur.* 639 and 647.

The Notice Imported by the Existence and Purpose of the Los Angeles Aqueduct.

As testified by Mr. Pedder, its then secretary-treasurer and later its president, respondent, *before* acquiring its properties on Owens Lake, *knew* of the *existence* and *purpose* of the Los Angeles Aqueduct. No one can be blind to the fact that an aqueduct constructed to provide a *municipal supply* of water is of necessity *operated in step* with the *demands* for such water, or unmindful of the seasonal, annual and cyclic *variations* in stream *flow* dependent, as such flow is, upon the wide contemporaneous variations in *precipitation* notice of which it is impossible to esape. Moreover (as we conceive), the practice of constructing, for municipal supply, aqueducts having capacity *in excess* of that currently needed in order to meet future *growth* in demands and equipped with control gates for the purposes of *regulating* the water *admitted* into the same, is so universal as to require the Court to take judicial notice thereof. It follows that, by its complaints alone [Clk. Tr. pp. 20-21, 210-212], respondent is shown to have had *notice*, when it acquired its properties, of the limited extent of *diversions* into the Los Angeles Aqueduct to be anticipated. Accordingly, it suffered no wrong by action on petitioners' part conforming strictly to such notice. All thought of the possibility of *continuous* diversion from Owens River into the Aqueduct to its full *capacity*

or of operation of petitioners' reservoirs to like *capacity* whenever water in that amount should be available, or of petitioners' *controlling* the flow of the river in *excess* of their needs,—the basic idea upon which respondent proceeds,—is destroyed by the nature and the past use of the Aqueduct of which respondent had actual or imputed notice, and by which *alone* was its *future* use to be gauged.

The Crucial Findings of Fact Do Not Support the Judgment.

(a) There Is Neither Finding nor Evidence That Petitioners Ever Operated the Los Angeles Aqueduct to Continuous Full Capacity.

The crucial findings of fact are those respecting petitioners' *representations by conduct,* there being no other type of representation whatsoever. On this head the lower court found that "for many years prior to both 1932 and 1937, petitioners took *all* or *substantially* all of the water from Owens River into their Aqueduct system", and "during the years immediately preceding *took all of the surface water* therefrom" [Finding 6, par. 1; Clk. Tr. p. 525]; that "during certain of said years there were virtually *no diversions* of water from said Aqueduct system and during the remainder thereof * * * such diversions [had] *no material effect* upon * * * the *dryness* * * * of Owens Lake and the *alkalinity* of its subsurface brines" [Finding 7, par. 1; Clk. Tr. pp. 529-530]; that thereby petitioners "*represented* * * * that they would take, and led all interested persons to reasonably *believe* that they would take and continue to take [into said Aqueduct system], *all* of the flow of Owens River * * * up to the reasonable *capacity* of said

Aqueduct system * * * reasonably constructed and reasonably operated." [Finding 7, par. 2; Clk. Tr. pp. 530-531.]

The judgment herein, adopting respondent's theory of these causes, is in effect predicated upon a supposed *duty* in petitioners to operate the Los Angeles Aqueduct to *capacity*, notwithstanding the *demands* for water supplied by them did *not* in 1937, or at any time hitherto, require such operation. If this were a tenable view, it would necessarily be based upon operation of the Aqueduct to capacity prior to 1937. Accordingly, the total omission of any finding that the Aqueduct was *ever* operated to full *capacity* leaves the judgment without support.

(b) The Finding That Petitioners Diverted All of the Flow of Owens River During the Drought (When Such Flow Was Far Less Than the Aqueduct's Capacity), Constitutes No Basis for the Further Finding That Respondent Relied Upon the Diversions of All the River Flow Within the Aqueduct Capacity on the Recurrence of High Stages of the River.

Similarly, the omission of any finding *correlating* petitioners' taking of "all or substantially all" of the river flow with the volume of contemporaneous river *flow* likewise leaves the judgment without support, for as petitioners diverted all, or virtually all, of the river flow during the drought and (as is the fact) did *not* then operate the Aqueduct to capacity, such total diversion during that dearth of water could not *possibly* constitute any representation of future operation thereof to any greater capacity than theretofore. And as the diversions in 1937 and in the months thereof here in question were in *greater* volume than in any corresponding prior period, they could

have disappointed no legitimate expectation even though they still did not employ the full capacity of the Aqueduct.

The omission from the findings last referred to renders them inconsistent and contradictory, for as petitioners' diversions during the drought of practically all of the river's flow did *not* require the *full capacity* of the Aqueduct, they could constitute no representation by conduct leading respondent (as found by the trial court) "to reasonably believe that [petitioners] would take and continue to take [into the Aqueduct] *all* of the [river] flow * * * up to the [Aqueduct's] capacity."

The trial court further found that after respondent acquired its properties in 1932, petitioners "continued to operate their Aqueduct system as * * * theretofore * * * and * * * Owens Lake continued to be a 'dry lake'; [that] *in reliance thereon,*" respondent improved its properties, *etc.,* and operated the same until stopped by the flow of water into the Lake in 1937 [Findings 8 and 9; Clk. Tr. pp. 531 and 533-534]; and that in all these activities respondent "relied upon [such] continuance * * * and upon the *permanency* of the *construction* of petitioners' said Aqueduct system and of [their] taking of Owens River water therein and upon [their] operation [thereof] as it had been operated * * * prior to both 1932 and 1937" [Findings 10; Clk. Tr. pp. 533-537], "*so that* the bed of Owens Lake was *dry* and exposed." [Conclusion 1; Clk. Tr. pp. 561-562.]

It thus appears that respondent's reliance was *not* upon petitioners' diversions into the Aqueduct to its *capacity,* but upon the *dry* condition of Owens Lake,—the *resultant* of the low stage of the river during the drought and of petitioners' then diversions which, however, reduced the

contemporaneous lake discharge *less* than they did *in 1937*. Again, the finding, not being one of reliance on previous diversions by petitioners to the *capacity of* the Aqueduct, but upon the *dry* condition of the Lake ensuing upon *lower* diversions than in 1937, does not support the judgment.

(c) The Finding Respecting Petitioners' Supposed Departure in 1937 From Its Prior Mode of Operating the Aqueduct Is No More Than a Finding That They Did Not Divert All of the Then River Flow,—Diversion of All Such Flow Being the Sole Standard of Conduct Found to Have Been Established by Their Prior Diversions.

The findings respecting petitioners' conduct make their diversion of practically the whole of the river flow during the drought, the standard of conduct with which is contrasted their mode of operation in 1937. The lower court found that on February 6, 1937, petitioners departed from that standard by "suddenly start[ing] to divert water *out of* their Aqueduct system" and continuing so to do "intermittently * * * until the end of June, 1937" [Finding 11; Clk. Tr. pp. 538-539], *contrary* to their *manner of operating* the Aqueduct *prior* to both 1932 and 1937 [Finding 14; Clk. Tr. p. 544]; that petitioners' operation of said Aqueduct in 1937 was "substantially *different* from their * * * operation [thereof] prior to both 1932 and 1937" in that they failed to operate the Aqueduct and their Owens Valley reservoirs to reasonable *capacity*, and to utilize their spreading facilities in Owens Valley to the extent of their use thereof in both prior and

subsequent years[6] [Finding 15; par. 2, and Finding 16; Clk. Tr. pp. 547-552]; and that petitioners, having theretofore diverted substantially *all* of the flow of Owens River "did in the spring and summer of 1937" depart from such *prior* mode of operating the Aqueduct and "diverted"[7] such flow *from* said Aqueduct upon Owens Lake and respondent's properties. [Conclusions 2, 3 and 10; Clk. Tr. pp. 562, 564, 567-568.]

There could be no such departure if, as we have demonstrated, the established standard of petitioners' conduct was merely the diversion of the *whole* stream flow during the *drought*, as distinguished from diversions to the Aqueduct's capacity. Hence, the omission of any finding that petitioners have ever operated the Aqueduct to *capacity* leaves without significance the finding of a supposed "departure" in this regard from prior conduct. The finding is one,—*not* of a departure from prior *capacity* operation,—but only of a failure to take *all* of the river flow in

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[6]The finding last above referred to contrasts the slight falling off in petitioners' use of its spreading facilities in 1937 with their prior use thereof,—a circumstance bringing into relief the failure of the findings to contrast petitioners' *use* of the Aqueduct's capacity in 1937 with such use in *prior* years.

[7]The complaints allege that petitioners in 1937 "suddenly *ceased*" to divert "the waters of Owens River into the Aqueduct and * * * commenced to divert said waters or a substantial *part* thereof into Owens Lake." [Par. VIII, Clk. Tr. pp. 164-165.] The departure in the findings from this allegation is explained by respondent's change of front during the trial by contending that petitioners, after 1929, diverted *all* of the flow of Owens River because the river channel passes through the Tinnemaha regulating reservoir. The Supreme Court of California, however, correctly treats the acts complained of as an "exclusion" of water from the Aqueduct,—and not as a "diversion" therefrom,—since it bases its decision on the rule that "one who makes substantial expenditures in reliance on long-continued *diversion* of water by another has a right to have the diversion *continued* if the investment would otherwise be destroyed." [143 Pac. (2d) 15.]

1937 after having diverted all thereof when such flow was far *less* than the Aqueduct's *capacity* and when the *proportion* of such capacity actually employed in such total diversion was far *less* than was in use either in 1937 or in the months thereof here in question.

(d) The Finding Respecting the Supposed Waste of Water Due to Its Exclusion by Petitioners From the Aqueduct Does Not Support the Judgment.

Finally, the trial court found that all water by petitioners "diverted",—*i. e., excluded,*—from the Aqueduct and, by reason of such exclusion, discharging into Owens Lake was and is "wasted" because of the Lake's saline character, and that its beneficial use is forever lost. [Finding 14; Clk. Tr. pp. 544-545.]

This finding does not sustain the judgment. It rests upon the provision of the Constitution of California declaring it to be necessary "that the water resources of the State be put to beneficial use * * *, that the waste * * * of water be prevented, and that [its] *conservation* is to be exercised with a view to the *beneficial use* thereof in the interest of the people and for the public welfare"; and further imposing (in consonance with the prior decisions on the extent of the appropriative right) the limitation to *beneficial use* "upon the right to water * * * from any stream * * * in this State." Prior to the decision and judgment whereof review is here sought, the Supreme Court of California had held that this inhibition upon the "waste of water" did *not* comprehend the natural discharge of water into a saline lake or into the Pacific Ocean. [See cases cited in the foregoing petition, p. 30.]

We have already pointed out that the constitutional amendment of 1928 did *not* change the rule of beneficial

use theretofore applied to appropriative water rights, but merely extended that rule to riparian rights. If, as the authorities cited clearly demonstrate, any surplus water in the Owens River watershed, over and above that necessarily to supply the needs of The City of Los Angeles, was subject to appropriation as of right by other appropriators, how can it be said that petitioners were under an *obligation* to take and *dispose* of the same, whether by finding other beneficial uses therefor, or by conserving it, or by wasting it? In respect of water not currently needed (including carry-over storage), the City not only has ***no*** *obligation* to take it but it has *no option* in that regard. The amount of water that it may take at any moment of time is limited to such as it "reasonably required for the *beneficial use* to be served," and the right so to take is by the Constitution defined as "*not* extend[ing] to the *waste*, or unreasonable use, or unreasonable method of use, or unreasonable method of diversion, of water." So long as any *surplus* over and above the water necessary to serve the City's needs is not availed of by other appropriators, the *right* thereto remains in Pothier's "negative community." How, then, can the diversion and disposal of this excess water constitute a burden that the City must bear in the interim in the interest of a *downstream proprietor?* If, in 1937, petitioners "wasted" water because, having no use for it, they did not take it, how can it be said that they could have *avoided* this waste by taking an additional 50,000 acre feet and running it out on the Mojave Desert and/or into the Santa Clara River,—even assuming (contrary to the fact), that they had *flowage rights* permitting them so to do? And if it had been permissible for petitioners to divert water merely to

waste it as indicated, how is it that this can be regarded as a "*conservation* with a view to *avoiding* waste?"

The Findings in question obviously proceed upon the wholly untenable theory that petitioners are, by the Constitution, compelled to take *active* measures in order to *avoid* the waste of *surplus* water entailed (according to the State court, adopting the view of respondent) by the *natural* discharge thereof into Owens Lake. Such so-called waste is one *imposed by nature* from the very beginning,—a waste materially *curtailed* by petitioners' operations. In short, it is not a *man-made* waste; and it is *only* man-made waste that falls under the prohibition of the Constitutional Amendment of 1928, Article XIV, Section 3.

We have treated the constitutional provision thus far as a prohibition of the "waste" of water, and in a sense so it is; but it will not be lost sight of that it is such a prohibition in terms of a declaration that the *right* to water is *limited* to such as "shall be reasonably *required* for the beneficial *use* to be served, and * * * does *not* * * * extend to the waste or unreasonable use" thereof. That is to say,—a *limitation* upon the appropriator's *right* is declared in terms of *use;* and as he *cannot use* the water until its diversion is an *accomplished fact*, the constitutional inhibition, which is in terms of a limitation on use,—has *no application* to any water *not diverted.*

The constitutional provision does *not, independent* of his use, impose on the appropriator a *duty*, by positive measures, to conserve water *not needed by him* in the interest of the State or of its individual citizens, inhabitants or property owners; and even if it had attempted so to do, the effort would have failed as violative of the due process

clauses of Article XIV, Section 1, of the Amendments to the Constitution of the United States, and of Article I, Section 13, of the Constitution of California, respectively.

The foregoing sufficiently presents the points relied upon by petitioners in support of their application herein. If the writs of certiorari prayed for be issued, petitioners purpose to invite this court's attention to certain additional erroneous rulings of the state court on points of general law having no jurisdictional significance. Accordingly, we submit a summary of such erroneous rulings without at this time presenting any argument or authorities thereon.

Erroneous Rulings of the Supreme Court of California on Points of General Law.

(1) The award of damages for loss of *prospective profits* was sustained notwithstanding the following facts:

(a) Respondent had had no profitable manufacturing *experience* in any year except 1934, and then in a plant and under a process *abandoned* in 1936 because of lack of brines suitable to be treated by that process.

(b) The two processes had *no* single operational step *in common*, and *no* apparatus performing the same *function* in each.

(c) The award was made on the basis of *90 tons* daily capacity in respondent's new plant which in fact was of *only 50* tons capacity until *after* the incursion of water upon the Lake in 1937 and was thereafter doubled.

(d) Respondent had in 1936 confessed inability to operate its new plant at a profit without such doubling of capacity, in an application made by it to the District Court of the United States under Section 77b of the Bankruptcy

Act for orders permitting it to finance the necessary enlargement of its new plant.

(e) The award of damages was made on the basis of this enlarged capacity by liberally discounting expenses incurred in operating at a loss in manufacturing 220 tons of soda ash in 1937 and 4053 tons in 1938 [Rep. Tr. pp. 22, 23-26], and on proof of sales by respondent of soda ash (by far the larger part of which was manufactured by others in Michigan and elsewhere) during the period 1937-1939, as follows:

1937, Total sales, 31,273 tons (of which 220 tons were manufactured by respondent),

1938, Total sales, 16,181 tons (of which 4,053 tons were manufactured by respondent),

1939, Total sales, 19,025 tons (of which no part was manufactured by respondent).

(2) The State court accords to respondent, under the equitable doctrine of estoppel, a right,—not measured by, nor commensurate with the conduct of petitioners held (erroneously) to have *created* such right,—but *transcending* such conduct by at least the difference between their maximum diversions prior to 1937 (or their current needs for water) and the natural flow of Owens River that could be accommodated within the capacity of the Los Angeles Aqueduct.[8]

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[8]For the rule that one successfully pleading an equitable estoppel thereby "acquires some *corresponding* right", see 3 Pomeroy Eq. Jur. [5th ed.], Sec. 804, p. 189, and notes at pages 181-183, 193-194, and 197, on *Horn v. Cole*, 51 N. H. 287; *Cornish v. Abington*, 4 Hurl. & N., 549, and *Stevens v. Dennett*, 51 N. H. 324.

Conclusion.

Upon the grounds set forth in the foregoing petition, as further develop in this brief, petitioners urge that the prayer thereof be granted and that, upon a full hearing thereafter, the said decision and judgment of the Supreme Court of California whereof review is here sought may be reversed by this Honorable Court.

Dated at Los Angeles, California, February 15, 1944.

Respectfully submitted.

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